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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Amendment to Part 90 Concerning the)
Commission's Finder's Preference Rules)

WT Docket No. 96-199

To: The Commission

DOCKET FILE COPY DUPLICATE

COMMENTS OF SMR ADVISORY GROUP, L.C.

SMR Advisory Group, L.C. ("SMR Advisory"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits its Comments in response to the Notice of Proposed Rulemaking, FCC 96-383 (released September 27, 1996) ("NPRM") in the above-captioned proceeding, in which the Federal Communications Commission ("FCC" or "Commission") proposes to eliminate the finder's preference program for the 220-222 MHz bands ("220 MHz Service"). For the reasons stated below, SMR Advisory supports the Commission's proposal.

I.

INTRODUCTION

SMR Advisory manages 220 MHz systems for approximately ninety (90) independently-owned licenses on the east and west coast of the United States and has been actively involved in the development of the 220 MHz Service. SMR Advisory is an active member of the 220 MHz Council of the American Mobile Telecommunications Association ("AMTA") and has

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worked both directly and indirectly through AMTA to assist the Commission in the formation of a regulatory framework which enhances the competitive potential of the 220 MHz Service in the mobile services marketplace. As an entity committed to the competitive development of the 220 MHz Service, SMR Advisory intends to be a major participant in the auction which has been proposed for the 220-222 MHz frequencies.

In the NPRM, the Commission proposes to eliminate the finder's preference program in the 220 MHz Service because of the incompatibility of finder's preference with its proposal for the implementation of geographic licensing and competitive bidding for the 220 MHz Service. With the limited resources available to the Commission for oversight of compliance with its construction and operational requirements, the finder's preference program was initiated to assist the Commission in ensuring that mobile radio channels, which were much in demand, did not remain unused.¹ The finder's preference program permits persons with information that might lead to a channel recovery on the basis of non-construction or discontinuance of operation and who are themselves eligible licensees, to file information with the Commission identifying the station licensee and rule violations and to be awarded a preference in obtaining the unused channels.² The finder's preference program originally included exclusive frequencies in the 220-222, 470-512, 800 and 900 MHz bands.³

¹ NPRM at 2.

² See 47 C.F.R. §90.173(k); see also NPRM at 2-4.

³ Amendments of Parts I and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, Report and Order, 69 Rad. Reg. 2d (P&F) 1577, 1589 (1991).

As the Commission has adopted geographic licensing and auctions for frequencies subject to finder's preference, it has consistently eliminated finder's preference for the affected frequency bands. In adopting geographic licensing in 1995 for the 800 and 900 MHz specialized mobile radio ("SMR") services, the Commission determined that it was in the public interest for the license winner to be given an exclusive right to any channels recovered by the Commission from incumbents who had either failed to construct or operate their stations in accordance with Commission rules.⁴ It was the intent of the Commission in developing geographic licensing to maximize the opportunities for geographic licensees to offer uniform service throughout the geographic area. Having determined that the geographic licensees would have the exclusive right to recovered frequencies, the Commission eliminated finder's preference for the 800 and 900 MHz SMR services because it no longer served a useful purpose.⁵

A licensing scheme similar to those for 800 and 900 MHz SMR has been proposed for the 220 MHz Service.⁶ Noting that the same considerations involved in eliminating finder's preference for the 800 and 900 MHz services apply to the 220 MHz Service, the Commission has tentatively concluded that the finder's preference program is "equally incompatible" with

⁴ NPRM at 5.

⁵ See NPRM at 5.

⁶ Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking, 11 FCC Rcd 188 (1995).

the licensing rules proposed for the 220 MHz Service and proposes the elimination of the finder's preference program for the 220 MHz Service.⁷

II.

DISCUSSION

A. **The Finder's Preference Program Should Be Eliminated for the 220 MHz Service Because It No Longer Serves the Public Interest.**

SMR Advisory concurs with the Commission that the finder's preference program serves no useful purpose under the new licensing scheme proposed for the 220 MHz Service. As originally conceived, the finder's preference program served the public interest by aiding the Commission in recovering unused spectrum. With the introduction of a geographic licensing scheme in which the licensee would obtain an exclusive right to recovered spectrum, there is no longer any place for the finder's preference program. Besides having an exclusive right to recovered spectrum, the geographic licensee also has an incentive to bring violations of construction and operational requirements by incumbents in its licensed area to the Commission because it has paid market value to the U.S. government for its right to recover unused spectrum as part of its bid for unencumbered spectrum. Having paid a substantial sum for its license, the geographic licensee has every incentive to attempt to recover and make the spectrum in its geographic area as productive as possible in order to realize a return on its investment.

⁷ NPRM at 5-6.

Given the likelihood that spectrum of the incumbents will not lie fallow under the new licensing scheme, there is little benefit to continuing to allow the public-at-large to serve as finders and, in fact, this would impose significant costs. Continuing the finder's preference program would result in lower bids in the proposed auctions for the 220-222 MHz channels because of the reduction in value of geographic licenses. Since finders are not required to pay the government the value of any recovered spectrum, there is no compensating value for loss of auction revenues that would be derived through licensing of the spectrum to finders. Additionally, the finder, who has not paid market value for the spectrum, has no incentive to deploy this spectrum rapidly and consistently with its highest value.

In addition to imposing costs on the public, continuation of the finder's preference program would work counter to the Commission's regulatory objective to enhance the competitive potential of the 220 MHz Service with respect to other commercial mobile radio services. The new geographic licensing scheme is being proposed to offer opportunities for a single operator to provide uniform service throughout a wide area and across a number of channels. This ability to aggregate a critical mass of spectrum permits the 220 MHz licensee to achieve economies of scale and utilize advanced technology that will enable it to offer services that are a competitive alternative to other types of commercial mobile radio services. For this reason, the Commission has proposed to give the geographic licensee the exclusive right to the recovered spectrum within its geographic area. To the extent that pieces of the spectrum are recoverable by others, the geographic licensee may be thwarted in its attempts to gain the critical mass necessary for advanced technologies and cost-effective systems. If the

competitive potential of the 220 MHz Service is to be enhanced under the proposed licensing scheme, the finder's preference program must be eliminated.

The Commission recognized these factors when it eliminated the finder's preference program for the 800 and 900 MHz SMR services. In these services, the Commission proposed new licensing schemes which included licensing by geographic area, auctions and the existence of incumbent licensees.⁸ Therefore, it follows that elimination of the finder's preference program for the 220 MHz Service is similarly in the public interest.

B. The Commission Should Dismiss All Pending Finder's Preference Requests for the 220 MHz Service.

The Commission has announced its decision to delay processing any 220 MHz finder's preference requests pending final action in this proceeding and has proposed to retain the discretion to dismiss pending requests if it decides to eliminate the finder's preference in the 220 MHz Service.⁹

SMR Advisory urges the Commission to dismiss all pending finder's preference requests for the 220 MHz Service. As the Commission itself noted, continued processing of site-based requests frustrates the intent of the geographic area licensing proposal by increasing encumbrances on the spectrum.¹⁰ In addition, unprocessed finder's preference requests thwart the competitive bidding process by creating uncertainty about the potential value of geographic licenses. This makes it difficult for auction participants to determine the value of a particular

⁸ NPRM at 5.

⁹ NPRM at 6.

¹⁰ NPRM at 6-7.

market and to secure financing. As a result, potential bidders may be driven away, particularly smaller businesses that lack the resources to evaluate uncertainties.

Dismissal of pending requests will not result in substantial inequities. Unlike the 800 and 900 MHz services, licensees in the 220 MHz Service were not subject to mandatory construction deadlines until recently. A series of extensions of the construction deadline for all 220 MHz licensees meant that there were no violations of construction and operational requirements that triggered finder's preference until this year when the construction deadlines were finally established. Licensees who were building at their original locations had a uniform construction deadline of March 11, 1996 and licensees who were relocating had a construction deadline of August 15, 1996 or thereafter, depending on the date of the grant of a modification application. Since a finder's preference request for failure to construct cannot be filed for 180 days after the construction deadline, there would likely have been few finder's preference requests for 220 MHz Service frequencies on file as of September 17, 1996 when the Commission adopted the NPRM.¹¹ Those few "finders" whose requests would be subject to dismissal are not without an alternative because they would still have the opportunity to obtain the available frequencies through the new licensing scheme.¹²

¹¹ Since many licensees decided to relocate and were subject to the later construction deadlines, finder's preference requests based on violations of construction and operational rules could not have been filed for many 220 MHz licenses in the period prior to the adoption of the NPRM.

¹² At the same time, the public will not lose the opportunity to receive value for the licensing of the spectrum.

III.

CONCLUSION

For the reasons stated above, the Commission should (i) eliminate finder's preference for the 220 MHz Service because it no longer serves the public interest and (ii) dismiss all pending finder's preference requests for the 220 MHz Service.

Respectfully submitted,

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